PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Telecommunications Division **RESOLUTION T-16522**
Market Structure Branch **November 29, 2001**

R E S O L U T I O N

RESOLUTION T-16522. PACIFIC BELL TELEPHONE COMPANY (U-1001-C). REQUEST FOR APPROVAL OF AMENDMENT NUMBER 6 TO THE INTERCONNECTION AGREEMENT BETWEEN PACIFIC BELL TELEPHONE COMPANY AND COVAD COMMUNICATIONS GROUP, INC. (U-5752-C), PURSUANT TO SECTION 252 OF THE TELECOMMUNICATIONS ACT OF 1996.

BY ADVICE LETTER NO. 21573 FILED ON JANUARY 18, 2001 AND BY SUPPLEMENTAL ADVICE LETTER NO. 21573A ON FEBRUARY 14, 2001.

SUMMARY

Although Amendment No. 6 to the Interconnection Agreement between Pacific Bell Telephone Company (Pacific) and Covad Communications Group, Inc. (Covad) has been approved through the passage of time provided under the terms of the Telecommunications Act of 1996, the Commission by this resolution gives notice to other parties contemplating interconnection agreements that advocacy rights are not appropriate subject matters for negotiation of interconnection agreements. The Commission will not enforce Section L of Amendment No. 6, and finds that the requirement to provide support and remain silent on the Pacific / SBC 271 application is not in the public interest. This resolution is effective today.

BACKGROUND

The United States Congress passed and the President signed into law the Telecommunications Act of 1996 (Pub. L. No.104-104, 110 Stat. 56 (1996)) (1996 Act). Among other things, the new law declared that each incumbent local exchange carrier has a duty to provide interconnection with the local network for any requesting telecommunications carrier. The new law also set forth the general nature and quality of the interconnection that the incumbent local exchange carrier (ILEC) must agree to provide.[1] The 1996 Act established an obligation for the ILECs to enter into good faith

[1] An incumbent local exchange carrier is defined in Section §251(h) of the 1996 Act.

negotiations with each competing carrier to set the terms of interconnection. Any interconnection agreement adopted by negotiation must be submitted to the appropriate state commission for approval.

Section 252 of the 1996 Act sets forth our responsibility to review and approve interconnection agreements. On July 17, 1996, we adopted Resolution ALJ-167 that provides interim rules for the implementation of §252. On September 26, 1996, we adopted Resolution ALJ-168 that modified those interim rules. On June 25, 1997, we approved ALJ-174, which modified ALJ-168, but did not change the rules for reviewing agreements achieved through voluntary negotiation. On November 18, 1999, we adopted ALJ-178, which added pick-and-choose provisions to the rules established in ALJ-174, but again did not change the rules for reviewing agreements achieved through voluntary negotiation. On October 5, 2000, we approved Resolution ALJ-181 to require any potential Competitive Local Carrier that intends to make use of our rules to have a Certificate of Public Convenience and Necessity (CPCN), or at least have filed an application for CPCN, prior to applying for approval of an agreement.

Pacific filed Advice Letter No. 21573 on February 14, 2001. This Advice Letter requested Commission approval of Amendment No. 6 to the negotiated Interconnection Agreement between Pacific and Covad under Section 252.

In ALJ-168 we noted that the 1996 Act requires the Commission to act to approve or reject agreements. We established an approach that uses the advice letter process as the preferred mechanism for consideration of negotiated agreements and amendments to those agreements. Under Rule 6.2 of ALJ-168, amendments filed by advice letter will be deemed approved without a Commission Resolution, 30 days from the date the advice letter is filed, unless the Commission takes formal action to reject an advice letter.

The amendment in this Advice Letter enhances the terms and charges for interconnection between Pacific and Covad. The amendment provides for the following:

- Performance Measures and Remedies.
- Stand-Alone xDSL-ISDN Loop Provisioning Intervals;
- HFPL Provisioning Intervals;
- OSS;
- Access to remote terminals, remote terminal collocation and broadband services offered by NGLC technology;

- Collocation, including collocation augments;
- Line-sharing;
- Covad's support of Southwestern Bell Company's 271 Federal Application;
- Waiver, Dispute Resolution and Limitation of Liability.

NOTICE/PROTESTS

Pacific states that copies of the Advice Letter, and the Agreement were mailed to all parties on the Service List of ALJ 181, R.93-04-003/I.93-04-002/R.95-04-043/I.95-04-044. Notice of the Advice Letter was published in the Commission Daily Calendar. Pursuant to Rule 4.3.2 of ALJ-181, protests shall be limited to the standards for rejection provided in Rule 4.1.4.[2] The Office of Ratepayer Advocates (ORA) filed protest on February 5, 2001.

ORA submits that the public interest is violated by the language in Section L of the amendment that requires Covad's mandatory support of the SBC ILEC Federal 271 Application. The amendment requires Covad to support Pacific's 271 efforts but it must do so without the ability to "comment formally or informally" on any effort of the SBC ILEC to gain state commission support for its Federal 271 application. This requirement is wholly unrelated to interconnection and has no place in an interconnection agreement. ORA also believes that the Commission's own 271 deliberations will be compromised by making interconnection with Pacific contingent on support of its Federal 271 application, since it sends the message that the 271 deliberations are not to be judged on pro-competitive merits, as required by law, but on Pacific's monopoly power and regulatory interests. ORA recommends rejection of Amendment No. 6 or, at least, a suspension of the Amendment until the unreasonable and anti-competitive defects are removed.

RESPONSES TO PROTEST

Both Pacific and Covad responded to ORA's protest. Pacific responded on February 14 and also filed Supplement Advice Letter No. 21573A seeking to extend the effective date of the Advice Letter to February 21, 2001. Pacific insists the content of Section L is intended to ensure that Covad raises specific concerns it has with Southwestern Bell Company ILECs to those ILECs directly rather than making surprise allegations in state 271 proceedings. Pacific also contends that many of its interconnection agreements contain similar language. Covad insists that the amendment serves the public interest

[2] See below for conditions of Rule 4.1.4.

in other ways, such as the offering of shorter provisioning intervals that allow Covad to respond more quickly to requests from customers.

DISCUSSION

In November 1993, this Commission adopted a report entitled "Enhancing California's Competitive Strength: A Strategy for Telecommunications Infrastructure" (Infrastructure Report). In that report, the Commission stated its intention to open all telecommunications markets to competition by January 1, 1997. Subsequently, the California Legislature adopted Assembly Bill 3606 (Ch. 1260, Stats. 1994), similarly expressing legislative intent to open telecommunications markets to competition by January 1, 1997. In the Infrastructure Report, the Commission states "…in order to foster a fully competitive local telephone market, the Commission must work with federal officials to provide consumers equal access to alternative providers of service." The 1996 Act provides us with a framework for undertaking such state-federal cooperation.

Sections 252(a)(1) and 252(e)(1) of the Act distinguish interconnection agreements arrived at through voluntary negotiation and those arrived at through compulsory arbitration. Section 252(a)(1) states that:

> "An incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251."

Section 252(e)(2) limits the state commission's grounds for rejection of voluntary agreements. Section 51.3 of the First Report and Order also concludes that the state commission can approve an interconnection agreement adopted by negotiation even if the terms of the agreement do not comply with the requirements of Part 51--Interconnection.

Rule 4.3.3 of ALJ-181 states that the Commission shall reject or approve the agreement based on the standards in Rule 4.1.4. Rule 4.1.4 states that the Commission shall reject an interconnection agreement (or portion thereof) if it finds that:

A. The agreement discriminates against a telecommunications carrier not a party to the agreement; or

B. The implementation of such agreement is not consistent with the public interest, convenience, and necessity; or

C. The agreement violates other requirements of the Commission, including, but not limited to, quality of service standards adopted by the Commission.

We make no determination as to whether the rates in this Agreement meet the pricing standards of Section 252(d) of the 1996 Act. Our consideration of this Agreement is limited to the three issues set forth in Rule 4.1.4 of ALJ-181.

In reviewing Amendment No. 6, we focused on Section L, which states:

> "SBC ILEC's 271 Application: Covad shall support the federal 271 application ("Federal Application") of SBC ILEC provided that SBC ILEC is not in material breach of this Amendment including but not limited to the performance measures, for the 90 calendar days between the 120th day before the filing of the Application and the 30th day before the filing of the relevant Application (the "evaluation Period") and during the pendency of the relevant Application (collectively "Federal 271 Requirements"). Covad may not withhold support unless it has escalated such alleged material breach through the Dispute Resolution process and used its good faith best efforts to bring such dispute to a reasonable resolution prior to withholding support, or escalated to the SBC ILEC executive level any such material breach that Covad does not believe falls within the dispute resolution process but that Covad believes constitutes a material breach of a commitment by the SBC ILEC and used its good faith efforts to bring such dispute to a reasonable resolution prior to withholding support. SBC ILEC shall provide Covad with at least 30 days advance notice of the filing of any Federal Application by SBC ILEC.
>
> Covad shall not comment, formally or informally, on any effort of SBC ILEC to gain state commission support for its federal 271 application ("State Application"). If SBC ILEC is in material breach of this Amendment for the Evaluation Period and during the pendency of the other regulatory proceedings. Consequently, each of the terms and conditions of this Amendment is legitimately related to, and conditioned upon, every other term and condition contained or referred to in this Amendment."

ORA states that the public interest is violated by this requirement for compulsory support of the SBC ILEC (Pacific) Federal 271 application and the specific language in Section L which restricts Covad from commenting either formally or informally on those matters related to gaining state commission approval. ORA asserts that such a requirement is anti-competitive because other competitors of Pacific are unlikely to opt into an agreement that carries with it a pledge to support Pacific's Section 271 application, as well as compromises the integrity of the Commission's 271 proceeding.

We share ORA's concerns with this requirement for compulsory support and silence. We believe this requirement will prevent competitors from effectively being able to accept the terms of the Agreement. Moreover, for those carriers like Covad that are

compelled to accept this requirement, we believe it causes an adverse impact on the public interest. Our pending Section 271 proceeding depends on a complete and robust record to allow us to render an accurate decision on whether Pacific has successfully met the Section 271 checklist requirements. If carriers are limited from raising issues, our determination process is inappropriately constrained. We find merit in ORA's protest and we believe a requirement to provide support for Pacific/SBC's 271 application is not in the public interest.

COMMENTS

Pacific filed comments on September 28, 2001 stating that the draft resolution is inconsistent with this Commission's policy regarding dispute resolution, is contrary to the public interest, violates the integration clause contained in Amendment No. 6, and improperly confers standing upon ORA to contest an amendment to an interconnection agreement between Pacific and Covad. Pacific insists that this Commission has urged Pacific to work with Competitive Local Carriers privately to determine what efforts and commitments would be necessary to gain support for Pacific's 271 approval. Amendment No. 6 is simply that commitment put in writing. By eliminating Section L of the Amendment, the draft resolution is ignoring language in that section that requires parties to work together in good faith. The draft resolution also ignores the fact that an integration clause in the amendment requires that all pieces of the agreement remain intact and no part may be severed from the rest. Pacific insists that ORA does not have standing to protest an interconnection agreement because ORA is not an aggrieved party.

Covad filed comments on October 1, 2001 stating that Section 252(e)(4) of the Telecommunications Act provides, "…if a State commission does not approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation… the agreement shall be deemed approved." Accordingly, Amendment No. 6 was deemed approved on May 15, 2001. The draft resolution violates Section 252(e)(4) of the Telecommunications Act by rejecting portions of the Amendment more than four months later. ALJ-181 provides an even shorter deemed approved time frame for amendments to interconnection agreements stating that amendments to existing interconnection agreements "…will be deemed approved… within 30 days from the date the Advice Letter is filed unless the Commission takes formal action to reject an Advice Letter."

REPLY COMMENTS

ORA submitted its response to Pacific's comments on October 3, 2001 stating that Pacific is confusing ORA with advocacy groups that operate outside the Commission and does not recognize that ORA is a part of Commission staff. ORA also insists Pacific's reading of Section 252(e)(6) of the Telecommunications Act limits the definition

of "aggrieved party" to those parties who are able to bring an action in federal district court to determine whether an agreement meets Section 251 and Section 252 requirements. The particular definition of aggrieved party that Pacific is using does not apply in this instance.

DISCUSSION BASED ON COMMENTS

ORA is a division of the Commission and all ORA staff are Commission staff given the responsibility for representing the public interest. As representatives of the public interest, ORA staff may protest all matters before the Commission for consideration. Pacific's assertion that ORA does not have proper standing to protest an advice letter has no merit.

Covad's assertion that Amendment No. 6 to the Interconnection Agreement between Pacific and Covad is already effective is misplaced. Through this resolution the Commission gives notice to other parties contemplating interconnection agreements that advocacy rights are not appropriate subject matters for negotiation of interconnection agreements. The Commission will not enforce Section L of Amendment No. 6, as it is clearly not in the public interest to do so.

A notice of availability and hard copy of the resolution was mailed on September 24, 2001 in accordance with PU Code Section 311 (g) to the parties who filed and responded to Pacific Bell Advice Letter No. 21573 and Supplement Advice Letter No. 21573A. In addition, the Telecommunications Division informed these parties of the availability of the draft resolution on the Commission website.

FINDINGS

1. Pacific filed Advice Letter No. 21573 requesting approval of Amendment No.6 to the Interconnection Agreement between Pacific and Covad.

2. ORA filed a protest claiming the amendment is not consistent with the public interest because it requires compulsory support of the SBC Federal 271 application.

3. Pacific and Covad filed responses claiming the amendment is consistent with the public interest because it ensures that Covad will not surprise Pacific with allegations in state proceedings, and allows Covad the opportunity to provide competitive xDSL service to California customers.

4. We find merit in the ORA protest. The requirement to provide support and remain silent on the Pacific/SBC 271 application is not in the public interest.

5. We find merit in Covad's comments and observe that the Interconnection Agreement between Pacific and Covad has been approved through the passage of time provided under the terms of the Telecommunications Act of 1996.

THEREFORE, IT IS ORDERED that:

1. The Commission gives notice to other parties contemplating interconnection agreements that advocacy rights are not appropriate subject matters for negotiation of interconnection agreements. The Commission will not enforce Section L of Amendment No. 6, as it is clearly not in the public interest to do so.

Resolution T-16522 is effective today.

I hereby certify that the Public Utilities Commission adopted this Resolution at its regular meeting on November 29, 2001. The following Commissioners approved it:

/s/ WESLEY M. FRANKLIN

WESLEY M. FRANKLIN
Executive Director

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners